



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-091

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Wappingers Central School District**

### **Appearances:**

Thomas, Drohan, Waxman, Petigrow, & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from an interim decision of an impartial hearing officer (IHO) which dismissed, in part, the relief sought in the parent's original due process complaint notice as moot. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (see 8 NYCRR 279.10[d]). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

Due to the limited nature of the appeal and disposition thereof, a full recitation of the facts and procedural history is not necessary and will not be included. Briefly, according to the parties' submissions, the student in this matter had transferred into the district for the 2017-18 school year,

as the result of family circumstances (Dist. Ex. 1 at p. 1).<sup>1</sup> A CSE meeting was held on May 23, 2018 to develop the student's IEP for the 2018-19 school year (Dist. Ex. 2 at pp. 1, 7). However, after changes in the family's circumstances occurred in spring 2018, the district notified the parent in a letter dated May 31, 2018 that the student was excluded from attending district schools, based on a residency determination by the district (see Dist. Ex. 16).

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated June 1, 2018 (Dist. Ex. 3). In the June 1, 2018 due process complaint notice, the parent appeared to raise numerous concerns about the adequacy of the CSE process and the student's IEP's for the 2017-18 and 2018-19 school years (id.). Among other things, as relief, the parent sought a pendency placement that would allow the student to complete the remainder of the 2017-18 school year in the district (id. at pp. 5-6).<sup>2</sup> In a response to the parent's due process complaint notice dated June 11, 2018, the district argued that it developed a program calculated to provide the student a FAPE, however, the student would not be entitled to a FAPE education or pendency placement from the district if the student were deemed not to be a resident of the district, (Dist. Ex. 6 at pp. 1, 3).

Shortly thereafter, on June 21, 2018, the parties participated in a telephone conference, the result of which was noted by the IHO as "the [s]tudent was permitted to finish the [s]chool [y]ear at the [d]istrict and pendency is no longer a critical issue" (Dist. Exs. 7, 8). The IHO set a schedule to allow the district to make a motion to dismiss, which was submitted on June 28, 2018, and to permit a response by the parent, which was submitted by letter dated July 2, 2018 (Dist. Exs. 9, 10).<sup>3</sup>

By letter to the IHO dated July 6, 2018, the parent filed an amended due process complaint notice, asserting that the district had failed to convene a resolution meeting with respect to the June 2018 due process complaint notice (Dist. Ex. 12 at p. 2). The parent's amended due process complaint notice included new allegations as well as reiterated multiple allegations from the

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<sup>1</sup> The interim decision rendered by the IHO, from which the parent appeals, was based entirely on the parties' written submissions and statements made by the parties during prehearing conferences for which there are no summaries or transcripts. No hearing dates had been held at the time, no exhibits had yet been admitted, and no testimony presented. For that reason, citations are to the documents as numbered in the district's letter dated August 8, 2018, transmitting the hearing record to the Office of State Review (Dist. Exs. 1-16).

<sup>2</sup> Pendency was discussed in a June 8, 2018 telephone conference however, no determination was made at that time (see Dist. Exs. 4, 5).

<sup>3</sup> In its motion, the district asserted, among other things, that the student was allowed to remain in school in the district to complete her coursework for the 2017-18 school year ending on June 24, 2018, but that the due process complaint notice should be dismissed with respect to the parent's requests for the 2018-19 school year because the student was no longer a resident of the district (Dist. Ex. 9 at pp. 1-2). In a response, the parent argued that despite the discussions of pendency, the student "received no classroom instruction or support services" as of June 4, 2018, nor did the student attend school, or participate in year-end finals for the remainder of the 2017-18 school year (Dist. Ex. 10 at pp. 4, 5). The parent also asserted that the IHO should not dismiss the matter with respect to issues concerning the provision of FAPE for the 2017-18 school year for which the district was responsible (Dist. Ex. 10 at pp. 5-6).

original due process complaint notice regarding the conduct of the district staff with respect to the September 2017 and May 2018 CSE meetings, as well as challenging the substantive aspects of the resulting IEPs (see id. at pp. 2-4, 9-10).

### **A. Impartial Hearing Officer Decision**

In an interim decision dated July 13, 2018, the IHO dismissed in part the parent's original due process complaint notice (Dist Ex. 13). The IHO's interim decision stated that "[p]endency became an issue and it was discussed in several phone conferences. The Parties agreed to a pendency placement until the end of the school year" (Dist. Ex. 13). The IHO went on to determine that he lacked jurisdiction to adjudicate a claim that the district "refused" to provide the parent with the student's educational records; the issue of parental notification of matters related to the 2017-18 school year was moot as the school year was over; and that the issue of the district's funding of an IEE was still a live controversy (id. at pp. 1-2). The IHO also made a statement in the interim decision that there were three issues "[w]ith respect with the application to amend the complaint notice" (Dist. Ex. 13 at p. 2).<sup>4</sup> While the IHO dismissed the first and second claims, the IHO determined that he would allow the amendment to the due process complaint notice and allow the matter to proceed to a hearing on the parent's IEE claim (id. at p. 2).

### **IV. Appeal for State-Level Review**

The parent appeals with the assistance of an advocate who is a paralegal from another state. The parent appears to disagree with the IHO's statement that the "[p]arties agreed to a pendency placement until the end of the [2017-18] school year." In a challenge to the IHO's mootness finding, the parent first noted that the IHO's determination was unclear as to which of the parent's claims were adjudged as moot. The parent also objects to the IHO's characterization of the contents of the amended due process complaint notice. The parent challenges the IHO's findings regarding educational records and mootness.

In an answer, the district responds to the parent's allegations and asserts that the request for review should be dismissed because, among other things, an interlocutory appeal is not permitted because pendency is not at issue.<sup>5</sup>

### **V. Discussion and Conclusion**

As indicated above, State statutes and regulations governing the practice of appeals for students with disabilities limit appeals from an IHO's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10 [d]; see Educ. Law § 4404[4]). Here, the IHO's

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<sup>4</sup> The meaning of the IHO's reference to the amended complaint is not entirely clear as the IHO then proceeds to identify matters in the original due process complaint notice. However, none of the IHO's statements relate to the student's pendency placement.

<sup>5</sup> The district further asserts a number of other defenses which go to the merits of the case, that are not related to a pendency determination.

interim decision dated July 13, 2018 did not explicitly address a pendency dispute, but instead stated that the "[p]arties agreed to a pendency placement until the end of the school year" (Dist. Ex. 13). The only determinations that the IHO made related to access to/correction of records; parental notification with respect to the 2017-18 school year; and a parental demand for an independent educational evaluation (IEE) (*id.* at p. 1-2). Although referencing the IHO's earlier understanding that the parties had agreed to the student's pendency placement by way of background, the IHO's interim decision neither determines the student's pendency placement, nor does it purport to refuse to decide a pendency dispute. Instead, in accordance with the administrative record developed thus far, it appears that at the time he issued the interim decision, the IHO was unaware that the parent believed that pendency should be further addressed. Additionally, the parent does not identify in her request for review what special education and related services she believes the student's pendency placement should consist of, nor does she seek a pendency placement determination among her enumerated requests for relief. Instead, to the extent that the parent utilizes the term "pendency" in this appeal, it may stem from a belief that the district failed to implement pendency services after June 1, 2018 (violated stay-put), but the request for review is far from clear on that point, and it clearly advances a desire to overturn the IHO's other interim rulings which constitute impermissible interlocutory challenges at this juncture.

Although the parent's appeal must be dismissed, I note that since State regulations allow a party to seek review of any interim decisions issued by an IHO upon that party's appeal of the IHO's final determination (8 NYCRR 279.10[d]), the interim decision remains subject to review. Thus, if necessary, the parent may appeal from the IHO's July 13, 2018 interim decision after the IHO closes the hearing record and renders a final determination on all of the remaining issues in the proceeding. To the extent that the parent now indicates that she did not agree to a pendency placement for the student, the IHO may wish to consider further developing the hearing record by allowing the parent to be heard on that matter, on the record, in the event that either party seeks further administrative or judicial review.<sup>6</sup>

Lastly, I note that although assisted by an advocate, the parent's request for review does not comply with State regulations. In the event the parent appears before the Office of State Review in the future, she is cautioned to ensure that her pleadings conform to the requirements of Part 279 of State regulations, particularly that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]), particularly that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8).

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<sup>6</sup> The IHO is reminded that, as a part of the impartial hearing, a copy of a transcript or adequate written summary of the conference (or prehearing conference) should be entered into the hearing record (*see* 8 NYCRR 200.5[j][3][v], [xi]). In such a conference summary the IHO may further clarify the basis for his statement that the parties had agreed upon the student's pendency placement and identify what special education and related services that placement consists of in the event this matter requires further administrative or judicial review.

Having considered all of the parties' contentions and concluded that the parent's appeal must be dismissed as premature, the necessary inquiry is at an end and no further determinations are warranted at this time.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                          **August 24, 2018**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**